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No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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For an amount to be "fixed" by a settlement agreement as "payable for" child support within the meaning of Sections 22(k) and 23(u) of the Internal Revenue Code of 1939, it is sufficient that the terms of the agreement, considered as a whole, indicate the amount which the husband undertakes to provide for child support; it is unnecessary to determine whether the terms of the agreement impose an enforcible obligation upon the wife to use that amount exclusively for the children	9
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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 9–17) are reported at 32 T.C. 1156. The opinion of the Court of Appeals (R. 19–25) is reported at 279 F. 2d 354.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1960. (R. 26.) The petition for a writ of certiorari was filed on August 31, 1960, and was granted on November 14, 1960. (364 U.S. 890; R. 27.) The jurisdiction of this Court rests on 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

The settlement agreement between the taxpayer and his divorced wife provides that the taxpayer is to make specified periodic payments to the wife for both her own support and the support and maintenance of their three children. These periodic payments to the wife are to be reduced by one-sixth on the death, emancipation, or marriage of each of the children (a total of one-half for the three children). The question presented is whether these reduction provisions "fix" one-half of the periodic payments as a portion which is "payable for" the children's support (as distinguished from alimony) within the meaning of Section 22(k) of the Internal Revenue Code of 1939, with the result that this amount is income taxable to the husband rather than to the wife.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes (Section 22(k) and Section 23(u) of the Internal Revenue Code of 1939) and regulations (Section 29.22(k)–1 and Section 29.23 (u)–1 of Treasury Regulations 111) are set forth in the Appendix, *infra*, pp. 35–37.

STATEMENT

The taxpayer and his wife [1] were divorced on April 27, 1951.[2] On April 16, 1951, in anticipation of the divorce, the parties entered into a settlement agreement (subsequently ratified by the divorce court),

[1] "Husband" and "wife" are used in this brief to include divorced spouses.

[2] The date of the interlocutory decree. The final decree was entered on November 5, 1952. (R. 12.)

the purpose of which, as stated in paragraph (d) of the preamble, was (R. 10):

> * * * to settle for all times their respective property rights, interests, duties and obligations with respect to each other, and to arrange by agreement for the making of periodic payments to the wife as and for the maintenance and support for her and the aforesaid children of the parties, in discharge of the husband's legal obligations arising out of, or in connection with the marital and family relationship bebetween the parties * * *.

The agreement provided that the wife "shall have the care, custody and control" of the three children (Judy, age 13; Joan, age 11; and Jay, age 9 (¶ 10).[3] By paragraph 11 of the agreement, the husband agreed "to pay the wife for the support and maintenance of herself and the children of the parties" stated percentages of his gross income, subject to maximum limitations. (R. 10–11.)[4] The husband additionally agreed to pay any extraordinary medical expenses of the children (¶ 11(f), R. 11). Paragraph 11(i) provided (R. 11):

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[3] The agreement, Exhibit 1, is not set out in full in the printed record but is included in the original record filed with the Clerk.

[4] Both the percentages and the limitations declined during the years 1951–1953 but thereafter became fixed. For the balance of 1951, the payments were to be 50% of the husband's gross income, not to exceed $50,000; for 1952 and 1953, 25%, not to exceed $45,000; for 1954 and thereafter, 20%, not to exceed an amount which would net, after income taxes paid by the wife, $15,600.

(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

The husband was required, until January 1, 1954, to name the wife as beneficiary to the extent of $20,000 in insurance policies on his life and was required, so long as he was obligated by law or agreement to support them, to name the children as beneficiaries to the extent of $30,000 (¶ 8(e), R. 7–8). In the division of property, the husband gave the wife the family residence, two automobiles, her personal effects, $10,000 in cash, and any bank accounts in her name (¶ 7). The husband agreed to pay the wife's legal fees incurred in the negotiation of the settlement except for the services rendered in connection with the "amount of support and maintenance payable by the husband to the wife in discharge of his obligation to support and maintain said wife and children" (¶ 12).

The taxpayer made periodic payments to the wife, under the agreement, totaling $23,000 in 1951 and $39,500 in 1952. On his income tax returns for those years, he claimed deductions for the entire payments under Sections 23(u) and 22(k) of the Internal Revenue Code of 1939. The Commissioner disallowed one-half of each deduction on the ground that the agreement fixed that part of the payments "as a sum which is payable for the support of minor children" within the meaning of Section 22(k) and hence not deductible under Section 23(u). (R. 12.) The Tax Court, in deficiency proceedings, upheld the Commissioner's determination. (R. 9–17.) The Court of Appeals reversed, holding that the agreement did not fix that amount as a sum "payable for" child support within the meaning of the statute. (R. 19–26.)

SUMMARY OF ARGUMENT

Sections 22(k) and 23(u) of the 1939 Code changed the rule established by prior case law and provided that the wife shall be liable for taxes on periodic payments made by the husband, pursuant to a separation or divorce decree, in satisfaction of his marital or family obligations. There was an important exception: The husband, rather than the wife, is taxable on

> that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband.

This case involves the interpretation of the statutory exception.

The settlement agreement here provides that the periodic payments to be made to the wife are for her support and for the support of the minor children. It also provides that there shall be a reduction of the payments by one-sixth upon the death, marriage or emancipation of each of the three children of the marriage. It does not require the wife to spend a specific sum on each of the children; she is limited only by her general duty to provide adequately for each of them.

The court below has held that the statutory exception is not satisfied, and the wife is obligated to pay income tax on the entire amount of support money received from the husband, because the instrument does not fix a specific amount which the wife is *required* to use *solely* for child support. The Commissioner's view, followed administratively since the adoption of the statute and supported by the Tax Court and by the weight of appellate decisions, is that the provision admits of a less rigorous interpretation. In the First Circuit's words (*Metcalf* v. *Commissioner*, 271 F. 2d 288, 291–292), we believe "the proper rule to be that it is sufficient if the parties, by their agreement, have shown a clear intention to distinguish in the periodic payments between what is paid to the wife because of her undertaking to support the children, and what is for herself, independent of that undertaking."

It is not necessary to read the words "amount * * * payable for" child support as requiring a provision in the instrument which deprives the wife of all discretion in allocating money within her family group. An amount may be said to be fixed for child support, within the contemplation of the taxing statute, if the instrument shows that the parties have drawn an ascertainable line as between the amount paid to the wife in recognition of her right of support and an amount paid in recognition of the children's needs. Intrinsic support for this interpretation is found in a succeeding sentence of the statute which provides that if the husband's total payment is less than the amount prescribed in the agreement, it shall be considered a payment for child support to the extent that a sum is payable for that purpose. This statutory presumption suggests a congressional purpose to relieve the wife of the tax burden on child support money to the extent that there is a practicable means of doing so without relieving her of the duty to pay taxes on alimony payments.

The legislative history, though not conclusive, suggests the same approach. Congress' primary aim was to change the rule in relation to alimony payments. Under prior law, the husband was generally liable for the amounts paid as alimony, but there was an exception in cases where the decree, the settlement agreement and state law operated to discharge the husband. Congress, anxious to avoid the inconsistencies which resulted from reference to state law, decided to place upon the wife the obligation to pay taxes upon alimony. At the same time, however, it was apparently

of the view that the husband, in fairness, should pay taxes on any amount paid to the wife in discharge of his obligation to support the minor children. The practical problem was one of administration: How was the Commissioner to allocate if single periodic payments were made for a dual purpose? Congress' answer was that an allocation should be made if the instrument provided a means of designating a specific portion of the payment as made in recognition of the obligation of child support. We find no indication in the legislative history that the designation would be deemed defective in the absence of an enforcible promise by the wife to use the designated sum solely for the children.

The Commissioner's interpretation was uniformly accepted by the courts in the years preceding 1954, when the statute was reenacted without significant change. There is thus implied congressional approval. A further factor of some weight is that many tens of thousands of settlement agreements were negotiated before any conflict portended. Doubtless, many of the parties to these agreements relied upon what was, until recently, regarded as a settled rule.

A further objection to the Second Circuit's approach is that under it the wife will almost invariably be required to pay taxes on money intended for use as child support, even though there appears to be a reasonably adequate basis for segregating that sum from alimony payments. It is relatively rare that a settlement agreement expressly states that the amount to be paid by the husband for child support must be used by the wife *solely* for the support of the children,

without discretion on the wife's part to decide if a certain use of a part of the money for her own benefit will also benefit the children. The tone of the legislative history does not suggest that the wife should have to pay taxes on the entire amount of support money in all but the most exceptional instances.

There is still another objection. In order to determine whether a settlement agreement restricts a wife so that she may use a designated portion of the money *only* for purposes of child support, one must make a prognosis of what the local divorce or equity court would hold. Yet it is clear that the 1942 legislation was largely prompted by a desire to avoid the difficulties, uncertainties and inconsistencies which inhere in that method of decision.

ARGUMENT

FOR AN AMOUNT TO BE "FIXED" BY A SETTLEMENT AGREEMENT AS "PAYABLE FOR" CHILD SUPPORT WITHIN THE MEANING OF SECTIONS 22(k) AND 23(u) OF THE INTERNAL REVENUE CODE OF 1939, IT IS SUFFICIENT THAT THE TERMS OF THE AGREEMENT, CONSIDERED AS A WHOLE, INDICATE THE AMOUNT WHICH THE HUSBAND UNDERTAKES TO PROVIDE FOR CHILD SUPPORT; IT IS UNNECESSARY TO DETERMINE WHETHER THE TERMS OF THE AGREEMENT IMPOSE AN ENFORCIBLE OBLIGATION UPON THE WIFE TO USE THAT AMOUNT EXCLUSIVELY FOR THE CHILDREN

A. INTRODUCTORY

Sections 22(k) and 23(u) of the Internal Revenue Code of 1939[8] (Appendix, *infra*, pp. 35–36) provide, with one exception, that all periodic payments in dis-

[8] Sections 71 and 215 of the 1954 Code are substantially identical.

charge of marital or family obligations made pursuant to a separation or divorce decree or agreement shall be taxable to the wife and deductible by the husband. The exception is that the wife is not taxable on, and the husband may not deduct,

> that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband.

Looking to the terms of the instant agreement, as the statute directs, one finds that it contains the following elements:

> (a) Some part of the periodic payments to be made by the husband to the wife are required to be used for the support of the children. The agreement provides that the payments to be made to the wife are "for the support of herself and the children," and the wife could no doubt be held accountable if she failed adequately to provide for the children out of the payments.
>
> (b) The total specified payments to the wife are to be reduced by one-sixth upon the death, marriage, or emancipation of each of the three children. Thus a specific part of the payments (one-half) is made terminable upon events which would likewise terminate the husband's duty at law to support the children.
>
> (c) The agreement does not require the wife, while receiving the total payments and supporting the children, to use this one-half *solely* for the support of the children. She is left free, so far as the terms of the agreement are concerned,

> to use the total amount as she sees fit, and in whatever proportions she deems appropriate, under the changing circumstances, limited only by her general duty adequately to provide for the children.

The court below, perhaps supported by the Sixth Circuit,[6] held that an agreement fixes an amount payable for child support within the meaning of the statute only if it fixes an amount which the wife is *required* to use *solely* for child support. Thus, the court, referring to its two previous decisions on the subject,[7] reiterated its statement in *Weil* v. *Commissioner*, 240 F. 2d 584, 588 (which was not necessary to the decision in that case), "that sums are 'payable for the support of minor children' when they are to be used for that purpose only" and that, "[a]ccordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose and the wife must have no independent beneficial interest therein." (R. 22.) Although conceding that the settlement agreement involved in the present case requires the wife to use the payments "to some extent" to support the children, the court below held (R. 23–24) that no amount was

[6] The opinion of the Sixth Circuit in *Budd* v. *Commissioner*, 7 T.C. 413, affirmed *per curiam*, 177 F. 2d 198, seems clearly contrary to the Second Circuit's view, which was first expressed in *Weil* v. *Commissioner*, 240 F. 2d 584, certiorari denied, 353 U.S. 958. However, the Sixth Circuit's later opinion in *Deitsch* v. *Commissioner*, 249 F. 2d 534, seems to follow the Second Circuit's view.

[7] *Weil* v. *Commissioner*, *supra*; *Hirshon's Estate* v. *Commissioner*, 250 F. 2d 497.

fixed as payable for child support because the wife "is to be free to use her judgment in allocating the collective unit among her children and herself" and has "discretionary power" under which "she is ordinarily free to allocate the payments as she thinks best, from time to time, spending on herself what she may think will in the end be for the best of the group." Noting that in *Metcalf* v. *Commissioner*, 271 F. 2d 288, the First Circuit had stated that "it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has 'no independent beneficial interest therein,'" the court below agreed, but stated that in its view the language of the statute cannnot be "recast so freely" as to permit a construction that amounts are fixed as payable for child support when the wife has a power of allocation as between herself and the children (R. 23). In short, the Second Circuit interprets the provision relating to child support payments as an exception in favor of the wife which has operative effect only if the settlement agreement imposes upon the wife an enforcible obligation to use a specified amount solely for child support.

In contrast, the First, Seventh, and Ninth Circuits (with the First and Ninth Circuits expressly disapproving the Second Circuit's view as previously reflected in *Weil*) have held that a settlement agreement fixes an amount payable for child support if, considering its terms as a whole, it identifies a sum which may fairly be deemed support money for the children rather than alimony for the wife. See *Metcalf* v. *Commissioner*, 271 F. 2d 288 (C.A. 1st);

Eisinger v. *Commissioner*, 250 F. 2d 303 (C.A. 9th), certiorari denied, 356 U.S. 913; *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th); *Mandel* v. *Commissioner*, 229 F. 2d 382 (C.A. 7th); *Joslyn* v. *Commissioner*, 230 F. 2d 871 (C.A. 7th). The Third Circuit has also applied this rule. See *Feinberg* v. *Commissioner*, 198 F. 2d 260, 263 (C.A. 3d). In the view of these circuits (which we support), a settlement agreement satisfies the statute if it contains language which (1) reflects a duty on the part of the wife to support the children; (2) specifies that the periodic payments to be made by the husband to the wife are for both the wife and the support of the children; and (3) provides a means of calculating the amount which the husband earmarked for the children.

Before turning to the precise statutory language, the legislative history and the relevant decisions, it may be well to focus upon the special problem with which Congress was dealing. Assume, for the moment, that Congress proposed to change pre-existing law so as to make the wife rather than the husband liable for income tax on sums paid to the wife as alimony; that Congress did not, however, desire to impose this burden on the wife in relation to sums paid by the husband for the support of minor children of the marriage; and, finally, that Congress recognized that in practice single periodic payments are commonly made to accomplish both purposes (i.e., support of the wife and support of the children). In this situation, a plausible solution, both from the standpoint of the parties and that of administration of the revenue, is

to afford relief to the wife whenever the husband-wife settlement instrument makes a designation of the amount intended for child support in terms sufficiently clear so that the Commissioner is enabled, as a practical matter, to segregate that amount from alimony. As we indicate in the sections of the brief which follow, that, we believe, was the basic approach which Congress adopted.

B. THE STATUTORY LANGUAGE

Sections 22(k) and 23(u) of the 1939 Code (which have similar counterparts in the 1954 Code) relate to periodic payments made by the husband to the wife in pursuance of a decree or written instrument incident to a divorce or separation and "in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband * * *." We emphasize at the outset, therefore, that what we are here concerned with is the discharge of a legal obligation of the husband through payments to the wife.

In combination, Sections 22(k) and 23(u) make each periodic payment by the husband to the wife taxable to the wife and deductible by the husband, with the following exception (contained in Section 22(k)):

> This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. * * *

It should be noted that the statute deals with but one periodic payment to the wife, rather than two separate payments for alimony and child support, and that the exception in relation to child support is for the "part" of that one payment which the "terms" of the settlement agreement "fix" as a sum "which is payable for the support of minor children of such husband." As to this "part," we think it may be said that the "terms" of an agreement "fix" a "sum" for child support if the amount is clearly ascertainable and the purpose is fairly manifest from the agreement.

In other words, it is not necessary, in our view, to read the statutory language as requiring the Commissioner to determine whether the wife has made an enforcible promise to use a specified share of the money for the children, i.e., a promise which the local divorce court would specifically enforce through its equity powers. We believe that Congress has provided, for tax purposes, a more flexible standard: whether the instrument shows a sufficiently clear purpose to earmark or allocate so that a designated portion may fairly be said to represent alimony and another portion to represent child support money.

The sentence which immediately follows the language directly in issue here sheds light on the Congressional purpose in relation to child support payments. It reads:

> In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the ex-

> tent of such sum payable for such support, shall be considered a payment for such support. * * *[8]

In other words, if the husband's payment is less than the total which he is supposed to pay for both alimony and child support, the payment will be considered child support for tax purposes. This provision obviously favors the wife where there is a question whether a payment by the husband represents alimony or child support, since she pays no tax on amounts payable for the latter purpose. It suggests, therefore, that the Second Circuit's view, which would allow the wife a benefit only in the relatively rare case when the instrument clearly deprives the wife of all discretion concerning use of the payments, is out of keeping with the Congressional purpose. Cf. *Cohan* v. *Commissioner,* 39 F. 2d 540, 543–544 (C.A. 2d).

C. THE LEGISLATIVE HISTORY

The legislative history of Sections 22(k) and 23(u) is not particularly illuminating in relation to the provision covering child support payments. It does show, however, that these sections were enacted in an effort to achieve uniformity of application with respect to the taxation of alimony payments. Also, it indicates that in excepting child support payments from taxation to the wife and making them taxable to the husband (by denying him a deduction), Congress' only concern was that a specific amount be designated as child support payments in the settle-

[8] For applications of this sentence, see *Weil* v. *Commissioner*, 23 T.C. 630, reversed on another ground, 240 F. 2d 584 (C.A. 2d).

ment agreement (apparently because no distinction between alimony and child support payments could be satisfactorily made by other means).

Prior to the enactment of Sections 22(k) and 23(u), there was no statute covering alimony. As a general rule, the husband was taxable on the alimony payments on the principle, enunciated by this Court in *Douglas* v. *Willcuts*, 296 U.S. 1, that payments made from an alimony trust to a divorced wife under a decree of alimony, being in discharge of a continuing obligation of the husband to support his former wife, are income to the husband. This principle was, of course, equally applicable to child support payments (if not more so).[9] An exception was recognized, however, for cases where the decree, the settlement agreement and state law operated to discharge the husband completely from the obligation of support. *Helvering* v. *Fitch*, 309 U.S. 149; *Helvering* v. *Fuller*, 310 U.S. 69; *Helvering* v. *Leonard*, 310 U.S. 80; *Pearce* v. *Commissioner*, 315 U.S. 543. To show a full discharge of the obligation (as opposed to a continuing obligation), the husband had to prove, by clear and convincing evidence, that under state law the divorce court did not retain the power to alter or revise the amount payable by him. *Ibid.* Because of the many variations in state law, the tax consequences proved un-

[9] See the following cases in which this Court reversed the decisions of the Courts of Appeals on the authority of *Douglas* v. *Willcuts*, *supra*; *Schweitzer* v. *Commissioner*, 75 F. 2d 702 (C.A. 7th); 296 U.S. 551; *Commissioner* v. *Stokes*, 79 F. 2d 256 (C.A. 3d); 296 U.S. 551; *Helvering* v. *Coxey*, 79 F. 2d 661 (C.A. 3d); 297 U.S. 694. See, also, *Helvering* v. *Stuart*, 317 U.S. 154, 170–171.

certain and inconsistent. Such was the situation when this Court intimated that Congress had "authority to design a different statutory scheme applying uniform standards for the taxation of income of the so-called alimony trusts." *Helvering* v. *Fuller, supra,* 310 U.S. at 75.

Congress responded promptly. In 1941, the year following the *Fitch, Fuller* and *Leonard* decisions, an amendment was proposed to add Sections 22(k) and 23(u) to the Code. The hearings, Senate debates, and the report of the Ways and Means Committee on the proposed amendment all suggested a change in the law so that the tax on alimony (but not child support payments) would be paid by the wife, in part because of the hardship to the husband, but principally to achieve uniformity.[10] Action on the proposed amendment was deferred by the conference committee "with the understanding that it will be considered in a later bill dealing with administrative matters."[11] Hear-

[10] See House Hearings, Revenue Revision of 1941, 77th Cong., 1st Sess., pp. 1009–1010; Senate Hearings, Revenue Act of 1941, 77th Cong., 1st Sess., pp. 750, 1469; S. Rep. No. 673, Part 1, 77th Cong., 1st Sess., pp. 32–33 (1941–2 Cum. Bull. 466, 491–492); Senate Debate, 87 Cong. Rec. (Part 7) 7257, 7267.

It was specifically stated in the Senate Finance Committee report (S. Rep. No. 673, *supra*) that the amendments were "designed to remove the uncertainty as to the tax consequences of payments made to a divorced spouse out of the net income of so-called irrevocable alimony trusts, arising from the recent Supreme Court decisions in *Helvering* v. *Fitch* (1940) (309 U.S. 149), *Helvering* v. *Fuller* (1940) (310 U.S. 69), and *Helvering* v. *Leonard* (1940) (310 U.S. 80), which decisions make the test of whether such income is taxable to the husband the existence of a continuing legal obligation under State law."

[11] H. Conference Rep. No. 1203, 77th Cong., 1st Sess., p. 11 (1941–2 Cum. Bull. 509, 512.)

ings were again held the following year, at which the Treasury suggested adoption of the previous proposal as a "fair solution" to the problem.[12] In the pertinent committee reports it was again stressed that the bill "will produce uniformity * * * regardless of variance in the laws of different States * * *."[13] The amendment, contained in Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, was passed and Sections 22(k) and 23(u) were added to the 1939 Code.

There was no discussion in any of the hearings, debates or committee reports as to whether the taxability of amounts paid by the husband for child support (in contrast to payments for the wife's support) would depend upon state law. Since the Congressional aim was to produce uniformity of application as to alimony payments, it may be presumed, however, that Congress also intended that the part of the statute in issue here should be given a uniform application. (The Second Circuit's interpretation, we argue *infra*, will produce a lack of uniformity.)

As to child support payments, Congress indicated merely that it did not intend to tax the wife if the payments were determinable in amount. Requiring a designation of amount was, of course, necessary, since there would otherwise be no satisfactory basis for differentiating between alimony and child support payments. In relation to the latter, the amendment

[12] House Hearings, Revenue Revision of 1942, 77th Cong., 2d Sess., p. 92; see also, *ibid.*, p. 624.

[13] H. Rep. No. 2333, 77th Cong., 2d Sess., p. 72 (1942-2 Cum. Bull. 372, 427); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 88 (1942-2 Cum. Bull. 504, 568).

proposed in 1941 as Section 22(k) of the 1939 Code stated (H.R. 5417, Section 117, 77th Cong., 1st Sess.):

> This subsection shall not apply to that part of any such periodic payment which, by the terms of the decree or written instrument, is specifically designated as a sum payable for the support of minor children of the spouses. * * *

In explaining this part of the proposed amendment, the pertinent committee report [14] simply drew a distinction between such a case and one where the periodic payments are for the support of both the wife and minor children "without such specific designation of the portion for the support of such children," in which event "the whole of such amounts are includible in the income of the wife * * *." Action was deferred on the entire amendment, as already noted. The amendment as submitted the following year (H.R. 7378, 77th Cong., 2d Sess.) used the word "fix" instead of "specifically designated". However, the child support provision was explained in the committee reports in the same manner as the amendment proposed in 1941,[15] except that the Ways and Means Committee report [16] also stated that—

> * * * the portion of such payments *going to* the support of minor children of the husband does not constitute income to the wife nor a deduction to the husband. * * * [Italics supplied.]

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[14] S. Rep. No. 673, *supra*, p. 35 (1941-2 Cum. Bull. at 493-494).

[15] See H. Rep. No. 2333, *supra*, pp. 73-74 (1942-2 Cum. Bull. at 429; S. Rep. No. 1631, *supra*, p. 86 (1942-2 Cum. Bull. at 570).

[16] H. Rep. No. 2333, *supra*, p. 46 (1942-2 Cum. Bull. at 409).

The lack of an explanation for the change, in 1942, in the language of the proposed amendment probably resulted from the fact that a member of the staff of the Office of the Legislative Counsel of the House of Representatives had explained in Senate hearings that the alimony provision had been revised with "a little more streamlined language" and that [17]—

> If an amount is *specified* in the decree of divorce *attributable* to the support of minor children, that amount is not income of the wife * * *. If, however, that amount paid the wife includes the support of children, but no amount is specified for the support of the children, the entire amount goes into the income of the wife * * *. [Italics supplied.]

Two observations may be made in connection with this legislative history. One is that the words "specifically designate," which were used most often in the committee reports, and the statutory word "fix" do not necessarily require an express statement that "x" dollars are to be paid for child support. The terms of a settlement agreement "fix" an amount payable for child support if they "direct unwaveringly" to, or "make definite and settled", the amount payable therefor.[18] The terms of a settlement agreement "specifically designate" an amount as payable for child support if they "mark out and make known * * * in a definite manner" or "with exactness and precision" the amount which is payable for

[17] Senate Hearings, Revenue Act of 1942, 77th Cong., 2d Sess., p. 48.

[18] See definition of "fix" in Webster's New International Dictionary (2d ed.).

child support.[19] It seems apparent that Congress was not concerned with *how* the "terms" of the settlement agreement "fix" the amount payable for child support, but only that the amount thereof be reasonably ascertainable.

In addition, the legislative history is important for what it does *not* show. Congress expressed no concern over the actual use by the wife of child support payments. It indicated no purpose to qualify the wife's exemption from tax on child support payments by exempting her *only* on the amount, if any, which she was legally obligated to use solely for the support of the children. Indeed, Congress did not even distinguish between (1) an amount which the husband was to pay for child support and (2) an amount which the wife was legally obligated to use solely for child support. It took a simple approach; it concerned itself only with a requirement that there be a sufficient designation of the amount which was being earmarked for child support.

D. THE ADMINISTRATIVE INTERPRETATION AND THE COURSE OF JUDICIAL DECISION

As noted earlier, Sections 22(k) and 23(u) were added to the Code in 1942.[20] Throughout the entire period since that time, the Commissioner has consistently urged the interpretation which we support here. Until the date of the decision below, the results

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[19] See definitions of "specifically" and "designate" in Webster's New International Dictionary (2d ed.).

[20] By Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.

reached in individual cases have been consistent with our view of the statute, although in several of these (principally in the Second Circuit) the rationale has not been.

The Treasury Regulations have never adopted the view that for a sum to be "payable for" child support within the meaning of the statute it must affirmatively appear that the wife has made an enforcible promise to use the designated amount exclusively for that purpose. From the beginning, the Regulations have implicitly assumed, as did the committee reports explaining the legislation (see *supra*, pp. 20–21), that it was enough if the instrument afforded a sound basis for inferring that a specific portion of the husband's payments was designed to serve as support for the minor children rather than as alimony for the wife.[21]

The first significant case on the subject was decided by the Tax Court in 1946: *Budd* v. *Commissioner*, 7 T.C. 413, affirmed, 177 F. 2d 198 (C.A. 6th). In that case, there was no specific provision as to the amount payable by the husband for child support but there was, among other things, a provision for a reduction in the amount of the payment to the wife when the minor son died or became 21 years of age. The Tax Court held that "[a]ny adequate consideration of the problem here presented requires a con-

[21] See Treasury Regulations 103, Sec. 19.22(k)–1, as added by T.D. 5194 (1942–2 Cum. Bull. 53); Treasury Regulations 111, Sec. 29.22(k)–1, Appendix, *infra*, pp. 36–37 (originally issued October 26, 1943); Treasury Regulations 118, Sec. 39.22(k)–1 (d); Treasury Regulations on Income Taxes (1954 Code), Sec. 1.71–1(e).

struction of the agreement as a whole * * *" and that, so considered, it was "apparent" that, of the $6,000 paid by the husband to his former wife in the taxable years pursuant to the separation agreement, the sum of $2,400 represented an amount fixed by the terms of the agreement "as a sum payable for the support of petitioner's minor child * * *." (7 T.C. at 417.) This decision was affirmed by the Sixth Circuit in a *per curiam* opinion (177 F. 2d 198), the Court of Appeals stating that it agreed with the Tax Court "that in considering the separation instrument as a whole it becomes clear" that $200 a month ($2,400 a year) "is earmarked for the support of the petitioner's minor son."

Since that time, the Tax Court has consistently applied the *Budd* interpretation of the statute in numerous cases [22] (on some occasions so liberally that

[22] *Moitoret* v. *Commissioner*, 7 T.C. 640; *Chapin* v. *Commissioner*, decided July 28, 1947 (1947 P-H T.C. Memorandum Decisions, par. 47,224); *Leslie* v. *Commissioner*, 10 T.C. 807; *Mandel* v. *Commissioner*, decided May 6, 1949 (1949 P-H T.C. Memorandum Decisions, par. 49,105), affirmed, 185 F. 2d 50 (C.A. 7th); *Fleming* v. *Commissioner*, 14 T.C. 1308; *Newcombe* v. *Commissioner*, decided February 19, 1951 (1951 P-H T.C. Memorandum Decisions, par. 51,045), affirmed on another point, 203 F. 2d 128 (C.A. 9th); *Swallen* v. *Commissioner*, decided May 22, 1951 (1951 P-H T.C. Memorandum Decisions, par. 51,149); *Hicks* v. *Commissioner*, decided June 19, 1953 (1953 P-H T.C. Memorandum Decisions, par. 53,216); *MacKay* v. *Commissioner*, decided January 26, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,032); *Seltzer* v. *Commissioner*, 22 T.C. 203; *Weil* v. *Commissioner*, 22 T.C. 612, modified, 23 T.C. 630, affirmed in part and reversed as to this point, 240 F. 2d 584 (C.A. 2d), certiorari denied, 353 U.S. 958; *Neuwahl* v. *Commissioner*, decided July 21, 1954

it was reversed on appeal).[23] The first suggestion of disagreement in the Courts of Appeals was in 1957, fifteen years after the enactment of the statute, when the Second Circuit decided *Weil* v. *Commissioner*, 240 F. 2d 584, certiorari denied, 353 U.S. 958. In the interim, the Sixth and Seventh Circuits (*Budd* v. *Commissioner*, 7 T.C. 413, affirmed *per curiam*, 177 F. 2d 198 (C.A. 6th); *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th)) followed the interpretation which had been adopted by the Tax Court—an inter-

(1954 P-H T.C. Memorandum Decisions, par. 54,206); *Joslyn* v. *Commissioner*, 23 T.C. 126, affirmed in part and in part reversed and remanded, 230 F. 2d 871 (C.A. 7th); *Gantz* v. *Commissioner*, 23 T.C. 576; *Ball* v. *Commissioner*, decided April 13, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,084); *Eisinger* v. *Commissioner*, decided February 29, 1956 (1956 P-H T.C. Memorandum Decisions, par. 56,048), affirmed 250 F. 2d 303 (C.A. 9th), certiorari denied, 356 U.S. 913; *Deitsch* v. *Commissioner*, 26 T.C. 751, reversed and remanded with directions, 249 F. 2d 534 (C.A. 6th); *Morsman* v. *Commissioner*, 27 T.C. 520; *Hirshon's Estate* v. *Commissioner*, 27 T.C. 558, reversed and remanded, 250 F. 2d 497 (C.A. 2d); *Boettiger* v. *Commissioner*, 31 T.C. 477; *Metcalf* v. *Commissioner*, 31 T.C. 596, affirmed, 271 F. 2d 288 (C.A. 1st); *Ashe* v. *Commissioner*, 33 T.C. 331, November 27, 1959, pending on appeal to C.A. 6th; *Haber* v. *Commissioner*, decided May 4, 1960 (1960 P-H T.C. Memorandum Decisions, par. 60,084), pending before the Fourth Circuit on the husband's appeal and before the Second Circuit on the Commissioner's protective appeal.

[23] See *Weil* v. *Commissioner*, 22 T.C. 612, reversed, 240 F. 2d 584 (C.A. 2d), certiorari denied, 353 U.S. 958; *Deitsch* v. *Commissioner*, 26 T.C. 751, reversed, 249 F. 2d 534 (C.A. 6th); *Hirshon's Estate* v. *Commissioner*, 27 T.C. 558, reversed, 250 F. 2d 497 (C.A. 2d). These reversals by the Second and Sixth Circuits were consistent in result with a proper application of the *Budd* rule, even though the opinions suggested disagreement with that rule.

pretation recently formulated in *Eisinger* v. *Commissioner*, 250 F. 2d 303, 308 (C.A. 9th), certiorari denied, 356 U.S. 913, as follows: [24]

> The general rule which we here approve is that when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated or apportioned or allocated the payments to be made, *one part to be payable for alimony, and another part to be payable for the support of children,* with sufficient certainty and specificity to readily determine which is which, without reference to contingencies which may never come into being, then the "part of any periodic payment" has been fixed "by the terms of the decree or written instrument" and satisfies the statutes and regulations hereinbefore quoted. * * *

In the *Weil* case, the Second Circuit stated that it must appear from the agreement, read as a whole, that the wife is required to use the money in question solely for the support of minor children. On its facts, however, *Weil* was distinguishable from the prior cases [25] and the result reached there was a permissible one under the general rule which had been applied by the Tax Court and by the Sixth and Seventh Circuits (as the government pointed out in its brief in

[24] In addition to the decisions of the Sixth and Seventh Circuits in *Budd* and *Mandel*, the Third Circuit, although not discussing the matter in any detail, decided a case requiring application of the *Budd* and *Mandel* rule. See *Feinberg* v. *Commissioner*, 198 F. 2d 260, 263 (C.A. 3d).

[25] There was no provision in that settlement agreement for a reduction of payments to the wife upon the death, marriage or emancipation of the children.

opposition to certiorari in that case, October Term, 1956, No. 871, pp. 10–11).

Three other cases were decided in the same year. In *Deitsch* v. *Commissioner*, 249 F. 2d 534, the Sixth Circuit subscribed to language taken from *Weil*, but, at the same time, reaffirmed its prior decision in *Budd* on the ground that it involved facts (a reduction clause) which warranted the conclusion that a specific amount was "earmarked" for child support. As in *Weil*, the result reached in *Deitsch* was not inconsistent with the prior course of decision.[26] In *Hirshon's Estate* v. *Commissioner*, 250 F. 2d 497, involving an agreement substantially the same as the one in *Weil*, the Second Circuit, in a brief *per curiam* opinion, relied upon its *Weil* decision. That case, too, was distinguishable on its facts.[27] In *Eisinger* v. *Commissioner*, 250 F. 2d 303, certiorari denied, 356 U.S. 913, the Ninth Circuit expressly approved the general rule which had been followed in the prior cases (see *supra*, pp. 23–26), distinguished *Weil* on its facts but stated that it did not agree "with the generality of some of its language" (p. 306), and stated that it disagreed with *Deitsch*. Subsequently, the Tax Court distinguished all three decisions—*Weil*, *Deitsch* and *Hirshon's Estate*—on their facts, stating

[26] The provisions for reduction of the payments to the wife were inconsistent and it was therefore at least questionable whether the agreement made a clear allocation of the amount payable for child support.

[27] The agreement provided for a reduction in the amounts payable to the wife upon her remarriage but contained no provision reducing such payments upon the death, marriage or emancipation of the children if the wife did not remarry.

further that it did not understand those decisions to preclude the result being reached in the case before it. See *Metcalf* v. *Commissioner*, 31 T.C. 596, affirmed, 271 F. 2d 288 (C.A. 1st); see, also *Ashe* v. *Commissioner*, 33 T.C. 331, now pending on appeal to the Sixth Circuit.

The next Court of Appeals decision on the subject was that of the First Circuit in *Metcalf*, *supra*, where, as in the present case, the settlement agreement did not "in so many words" make an allocation between alimony and support payments but contained "an obvious per capita arrangement" for the reduction of the payments to the wife upon the death, emancipation or marriage of a child (p. 290). Stating that, viewed in terms of their facts, the "cases on this subject are not in such conflict as has been suggested" (p. 291), the court commented on the Second Circuit's interpretation of the statute as follows (pp. 291–292):

> [W]e cannot feel that Congress, in using the phrase "payable for the support of minor children," intended such rigidity of restriction. Where a home is run as a unit, as is contemplated in the case of a parent having custody of minor children, it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has "no independent beneficial interest therein." We believe the proper rule to be that it is sufficient if the parties, by their agreement, have shown a clear intention to distinguish in the periodic payments between what is paid to the wife because of her undertaking to support the chil-

> dren, and what is for herself, independent of that undertaking. * * *

At about the same time, the Internal Revenue Service, having been requested to state its position with respect to *Weil* and *Eisinger,* issued a press release (Technical Information Release 119, dated December 16, 1958), and subsequently a revenue ruling based on the press release (Rev. Rul. 59–93, 1959–1 Cum. Bull. 22). The latter states:

> The Service will follow the decision of the United States Court of Appeals in the *Weil* case on this issue in cases involving similar facts and circumstances. However, in determining whether payments made under a divorce decree or separation agreement are to be treated as alimony or whether a portion is for the support of minor children, the Service will continue to follow its position as set forth in the rationale of the decision of the United States Court of Appeals in the *Eisinger* case. * * *

As appears from the above discussion, the consistent administrative practice and the weight of judicial authority support the rule which we are urging. It is significant, moreover, that there was no intimation of disagreement with this rule as of the time that Congress, in 1954, reenacted Sections 22(k) and 23(u) of the 1939 Code as Sections 71 and 215 of the 1954 Code, stating that the new provisions were substantially the same as existing law. H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A–20 to A–21, A–62 (3 U.S. Cong. & Adm. News (1954) 4621, 4805, 4858). Since, at this point, the Tax Court had already interpreted the 1939

Code provisions in a number of cases and the rule which it had fashioned had been accepted in the two Courts of Appeals which had passed upon the matter, there is basis for inferring congressional approval. A further factor is entitled to weight. Tens of thousands of settlement agreements have been drafted since 1942. Many of the parties to these agreements have presumably placed reliance upon what seemed, until relatively recently, to be a settled rule.

E. OBJECTIONS TO THE SECOND CIRCUIT RULE

From all indications, it is relatively rare that a settlement agreement expressly states or plainly requires that the amount to be paid by the husband for child support must be used by the wife *solely* for the support of the children, without any discretion on the wife's part to decide that a certain use of a part of the money for her own benefit will also benefit the children. We assume, moreover, that, in the absence of a clear indication of an intent to impose such a legal obligation on the wife, the local state courts (the only courts having jurisdiction to effectuate the terms of the agreement) would be reluctant to impose any such restrictions on the wife's use of the child support money and to impose accounting requirements on her. See *Yates* v. *Yates,* 183 Misc. (N.Y.) 934, 937. If these assumptions are valid, the provisions of the Internal Revenue Code covering child support payments will have very limited application if the Second Circuit's interpretation is adopted. As a practical matter, the wife will almost invariably be required to

pay taxes on money intended for use as child support, even though there appears to be a reasonably adequate basis for segregating that sum from alimony payments. It would seem that such a rigorous interpretation should not be adopted unless the Court concludes that it is compelled by the statutory language, for it must be remembered (see *supra,* p. 17) that under the law as it stood prior to 1942 it was the husband who was liable for taxes on monies which he expended in discharge of his continuing obligation to support the children.

Another serious objection is that, in the absence of an unequivocal provision restricting the wife's use of the child support money, the Second Circuit's interpretation would make the application of the federal statute depend upon state law. For tax purposes, the rights and obligations of parties under a written instrument are determined under state law, but the effect of those rights is a federal question. *Blair* v. *Commissioner,* 300 U.S. 5, 9–11; *Helvering* v. *Stuart,* 317 U.S. 154, 162. The Second Circuit's interpretation allows room for construction of the settlement agreement as a whole (see *Weil* v. *Commissioner, supra,* p. 588), but requires a determination as to whether a legal obligation is imposed on the wife with respect to her use of the child support payments. It necessarily follows that, to apply the child support provision, state law must be considered. Even a cursory examination of state court decisions interpreting settlement agreements shows that the inter-

pretations vary widely.[28] In many instances, moreover, there may be no state court decision squarely in point. In that situation, the parties may have to meet the type of problem which existed at the time of the old "alimony trust" cases (see *supra*, p. 17), *i.e.*, that one or the other (husband or wife) must show, by clear and convincing evidence, that state law does or does not impose a legal obligation on the wife to use the support payments solely for the benefit of the children. The burdens of making such a showing are formidable. More than that, there would be the same

[28] For example, provisions for the reduction of periodic payments to the wife upon her remarriage or upon the emancipation, marriage or death of the children have been held to establish the portion of the payments which are for child support, contrasted with alimony, under the laws of Michigan and Washington, but not under the laws of New York, Georgia, and Texas. *Sturgis* v. *Sturgis*, 300 Mich. 438; *Stafford* v. *Stafford*, 18 Wash. 2d 775; *Anderson* v. *Anderson*, 27 Wash. 2d 122; *Nichols* v. *Nichols*, 306 N.Y. 490; *Yates* v. *Yates*, 183 Misc. 934 (N.Y.); *Blalock* v. *Blalock*, 214 Ga. 586; *Brodhead* v. *Brodhead*, 238 S.W. 2d 832 (Tex.). The differences in state law in this area are illustrated further by the holdings that a divorced or legally separated wife who receives sums for child support is considered a trustee for the child under the laws of Indiana and Georgia (*Corbridge* v. *Corbridge*, 230 Ind. 201; *Stonehill* v. *Stonehill*, 146 Ind. 445; *Thomas* v. *Holt*, 209 Ga. 133), whereas in Connecticut the possibility that, in the absence of an explicit trust provision the wife may use some of the money for purposes other than child support, is recognized (*Steinmann* v. *Steinmann*, 121 Conn. 498). Under Kentucky law, the wife has a right to use some of the funds designated for child support for her own maintenance (*Napier* v. *Napier*, 286 Ky. 452), since, with respect to an allowance for child support, the wife and children are considered as a unit (*Eaves* v. *Eaves*, 286 S.W. 2d 371 (Ky.); *Conlan* v. *Conlan*, 293 S.W. 2d 710 (Ky.)).

confusion and inconsistency of result which Congress was seeking to avoid when it enacted the 1942 legislation.

In summary, we readily agree that an explicit promise by the wife to use a designated sum exclusively for the minor children makes a clear case under the statute (albeit an atypical case). Our disagreement is with the conclusion that nothing short of a binding obligation on the wife will do. We believe that there are other cases in which a court may properly conclude, on the basis of the particular agreement or instrument, that there is an adequate basis for segregating (for tax purposes) alimony payments from child support money. Congress, we submit, has left room for a more flexible standard than that prescribed in the decision below.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Sections 22(k) and 23(u) of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.), as added by § 120 of the Revenue Act of 1942, 56 Stat. 798, provide in part:

SEC. 22. GROSS INCOME.

* * * * *

(k) *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support,

shall be considered a payment for such support. * * *

* * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

2. Sections 29.22(k)–1 and 29.23(u)–1 of Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939, provide in part:

SEC. 29.22(k)–1. *Alimony and Separate Maintenance payments—Income to Former Wife.*— * * *

* * * * *

(d) *Payments for support of minor children.*—Section 22(k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a payment for

such support. For example, if the husband is by terms of the decree required to pay $200 a month to his divorced wife, $100 of which is designated by the decree to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22(k). Except in cases of a designated amount or portion for the support of the husband's minor children, periodic payments described in section 22(k) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated.

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Sec. 29.23(u)-1. *Periodic Alimony Payments.*—A deduction is allowable under section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under section 22(k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22(k)-1. (For definition of husband and wife in such cases, see section 3797(a)(17).)

3. Sections 39.22(k)-1 and 39.23(u)-1 of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939, effective January 1, 1952, are identical to the sections set out above.

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